May 16th, 2017

European Commission Public Consultation on the operations of the European Supervisory Authorities

Final Response

The International Swaps and Derivatives Association ("ISDA") and the Futures Industry Association ("FIA") are pleased to provide comments to the European Commission's ("Commission") consultation on the operations of the European Supervisory Authorities ("ESAs"). We appreciate the Commission's desire to engage with markets participants in order to identify areas where the effectiveness and efficiency of the ESAs can be strengthened and improved. We remain available to discuss the response in more detail.

Executive Summary

- ISDA and FIA (together "the Associations") members have always been supportive of the work undertaken by the ESAs and of their capability to produce harmonized and binding rules to implement EU financial legislation.

- The Associations' members particularly support the Level 2 consultation process with the industry as it enables market participants and stakeholders to assist regulators in implementing rules that, by its nature, have become increasingly technical and complex. However, the Associations' members point out that the drafting of Level 3 guidance does not necessarily include consultation processes with the industry. Given the significant impact Level 3 guidance issued by the ESAs may have on the industry, any consultation should be conducted in a more systematic way.

- The Commission's consultation on the operations of the ESAs is particularly welcome and we fully appreciate the need to assess how the tasks and powers, as well as governance and funding of the ESAs could be improved.

EU Rulemaking Processes and ESA involvement

- The ESAs are at the heart of financial reforms and we recommend providing the ESAs with adequate timelines and resources to enable the institutions to deliver financial reform and rules of the highest standards. Well-designed rules underpin a strong and stable European economy. Therefore, we

recommend the Commission consider the following vital elements that will enable the ESAs to fulfil its duties successfully and efficiently on an on-going basis:

a) Mandates should require the ESAs to draft technical standards within a reasonable timeframe. The industry's experience is that timeframes are often too short, particularly when ESAs have to consider more complex issues;
b) Timelines for Level 2 implementation should specify a period for ESA drafting rather than define an absolute date. A combination of 2 timelines is recommended, such as a 12 to 18 month period from the finalisation of Level 1 to the finalisation of the Level 2, and subsequently another 12 to 18 month time period from the finalisation of Level 2 rules to final rule application dates. This would allow sufficient time for the ESAs to draft Level 2 measures as well as allowing sufficient time for national regulators and the industry to implement the regulatory changes. EMIR (i.e. margin rules), CSDR, PRIIPs or MiFID II/MiFIR have proved how challenging, and sometimes impossible it is to meet absolute application dates. The implementation of the Market Abuse Regulation (MAR) is another example that demonstrates the negative impacts on implementation for both the industry and NCAs when Level 2 rules are finalised after the application date of the Level 1 Regulation.
c) New Regulations/Directives that require a large amount of changes to be implemented should be applied in a phased-in approach to avoid the numerous challenges of a big-bang implementation. Principles of prioritisation should be incorporated in Level 1 mandates in particular for legislation requiring a high number of Regulatory Technical Standards (RTS) (e.g. MiFID II/MiFIR);
d) Level 1 requirements should only come into effect after the effective dates of the more prescriptive Level 2 details to avoid legal uncertainty;
e) In order to avoid inconsistencies as a result of translating legislation that was initially drafted in English, we recommend the establishment of an advisory entity/body that could interpret legal concepts that may differ between the civil law and common law;
f) ESAs should have the opportunity to participate in the Level 1 discussions as an observer. They should in particular be allowed to provide opinions on Level 1 provisions that could contradict or affect the application of other insurance/banking/financial legislation or that raise legal or technical issues (e.g. extra-territoriality, privacy issues);
g) To avoid uncertainties around the entry into force of provisions, the Level 1 text should clarify that delegated/implementing acts may have a delayed application date, or that these acts provide for possible phase in periods of the obligations.

"Regulatory forbearance" regime

- Introducing a "regulatory forbearance" regime would improve the regulatory process of the ESAs, and consequently make them more effective and would make the implementation of EU financial legislation more manageable. Such a regime could mirror the US no-action letter regime. It would enable the ESAs to issue a letter stating that the ESAs or national competent authorities (NCAs) will not commence enforcement action for failure to comply with a specific provision of a EU Regulation or Directive, or of one of its implementing rules. Such a measure would provide the necessary flexibility to the industry through the relevant regulatory authorities (ESAs and NCAs) at times when needed most, particularly when introducing complex rules or general rules that are ill-suited for a particular entity. Such a tool would improve the operations of all ESAs. We would note that any such power granted to the ESAs should not preclude NCAs from applying their own discretion to grant their own forms of regulatory relief.

Increased supervisory powers for the ESAs

- The Associations in the past have supported the direct supervision of Credit Rating Agencies (CRAs) and Trade Repositories (TRs). Thus, the Associations would support an assessment of how a direct supervision of pan-European entities, such as systemic Central Counterparties (CCPs), would work in practice. This is an important question that would require further assessment. There are a number of factors that would need to be considered in deciding whether there should be a further transfer of supervisory responsibilities to the pan-European level, including:
  - the value of supervision at the national level by authorities that are closest to the market where the CCP is located and where there is already strong coordination between regulators through supervisory colleges;
  - the role of resolution authorities in the context of the EU draft regulation on CCP recovery and resolution;
  - the need for coordination between supervisors (i.e. financial markets regulators) and prudential/ resolution authorities for systemic market infrastructures.

- This is an important question that would require further assessment and consultation if the Commission considers expanding the current supervisory powers of the ESAs.

- We call for caution regarding direct supervision of third country firms that are recognised in the EU or of location requirements. This approach would run contrary to the global trend which is towards a system of equivalence through recognition of comparable rules, which increasingly bolsters liquidity and efficiency in the global markets.

Governance

- Regarding governance, the Associations have always supported transparency and strong coordination of regulators within each ESA, and coordination between the three ESAs. The Associations' members believe that the CWG should have a stronger advisory role which would enable the ESAs to take a more practical approach on coordination of implementation of highly technical legislation (e.g. reporting rules under various pieces of EU legislation).

- We also support a commitment of the ESAs to hold CWG meetings on a more regular basis, e.g. quarterly. Today, the meetings are not held on a regular basis, which may impact the effectiveness of the CWG. Detailed agenda items should also be provided to the CWG members ahead of the meetings, and the ESA secretariats should be encouraged to provide information, where possible, to the CWG concerning the outcomes of the Board of Supervisors (BoS) actions as a result of the advise provided by the CWG, and specifically with information on how the BoS considered the CWG advice and the rationale of the actions taken.

- The CWG should also be designed in a way that enables the delivery of advice on technical issues. Although it is generally perceived positively, that ESAs have a diverse and vast membership, it appears that the CWG cannot really address technical issues on a number of topics. The constitution of ad hoc sub-groups composed of experts should be beneficial when legislation requires technical analysis, for instance on clearing or on reporting (this is particularly relevant for the ESMA CWG given the technical dimension of most financial Directives and Regulations). These ad hoc groups would not be permanent or meet on a regular basis but their expertise would be required when the technical questions around the implementing rules of a specific legislation requires the concerned expertise.

- In terms of Governance, the withdrawal of UK authorities in the future may affect the balance between larger and smaller European Member States represented on the ESA BoS and it is difficult to foresee how this may alter the decision making process within the ESAs.

- Appropriate governance requirements should also include the Level 3 process by which the ESAs, notably ESMA, draft and publish Q&As to clarify the uncertainties arisen from Level 1 or Level 2 texts. Q&As are generally helpful and the industry welcomes these clarifications. The details provided in these Q&A are often very technical and provide critical interpretation of the law. However, the Q&As process should be more transparent - such that the industry is made aware of what questions the ESAs are considering - and more inclusive in terms of industry consultation. Currently, there is no obligation for the ESAs to consult on Q&As, we therefore suggest introducing a short consultation process ahead of the publication of Q&As. Full application of legislation is often heavily dependent on the Q&As that are produced (the implementation of the EMIR reporting provides a good example of the usefulness of Q&As) and for this reason better communication with the industry is required as Q&As deal with highly technical issues.

Funding

- The Associations share the view that the ESAs have been given important regulatory and supervisory powers with somewhat limited resources, due to budgetary constraints. The Associations' members also appreciate that the independence of the ESAs is an important characteristic that must be preserved.

- The question of the appropriate level of funding for the ESAs and whether additional contributions are needed depends to a large extent on the level of new responsibilities given to the ESAs, which is subject on the outcome of the ESA review. We are of the view that where activities (e.g. supervisory activities) are being moved from NCAs to the ESAs, their related budgets should move to the ESAs as well and should not lead to an overall increase of charges to the industry.

- For the industry, the funding topic should involve an open discussion with EU institutions and the ESAs to discuss the ESAs' budget and the potential forms of any industry contributions prior to the requirement for additional industry funding. Some key factors for any additional industry funding include:
  - How to strike the right balance between entities that are subject to direct supervision (CRAs, TRs), pan-European entities not subject to direct supervision (large banks, large asset managers, listed corporates, securities dealers, commodity dealers, administrators of critical and significant benchmarks), and entities that are active mostly at national level (retail banks, small asset management companies).
  - The impact Brexit will have on the ESAs' supervisory workload, and the population of firms that would be required to provide funding.
  - Any additional industry funding for the ESAs must be provided to the ESAs on the basis that the ESAs are transparent about how the funding is used, and that the ESAs ensure the additional funding is used to improve their operations in measurable ways, for example with better managed consultations and more timely Q&As.
  - The form that any additional industry contribution may take requires detailed discussion: should it take the form of a direct levy collected by the ESAs (how could a levy be collected from firms that are not directly supervised?), or should a levy be collected at national level by NCAs and

subsequently transferred to the ESAs? Is this considered a double-assessment if the industry is paying one time to the NCA and one time to the ESA for the same oversight?
- The question is much more complicated for ESMA than it is for the EBA and EIOPA because of the very heterogeneous nature of the ecosystem of financial markets and its stakeholders.

- If the Commission decides to opt for a model partially funded by the industry we would encourage the Commission to further consult on the details of such model to find a suitable and mutually beneficial outcome.

International role for ESAs

- The Associations want to highlight that beyond the European Union's jurisdiction, international consistency in the implementation of G20 commitments is critical for the effectiveness of the financial reform, particularly for derivatives markets, which by nature are global and not regional. We are of the view that the ESAs should continue to engage actively at an international level to ensure regulatory convergence. International standard setters such as the FSB, IOSCO and BCBS benefit from the expertise of the ESAs and also appreciate their experience in setting harmonised rules between many different sovereign states.

- We also recommend that the ESAs should enter into dialogue with third country jurisdictions at an early stage, especially when the ESA is assessing third country equivalence.

- We particularly note that around 40 new pieces of financial legislation have been adopted in the past seven years and that 15 of them include third-country provisions (see EC template: EC_equivalence_table_en.pdf). These processes may vary, i.e. some of them involve an outcomes-based process whereas some others involve a word-for-word analysis to ensure that legal texts are identical.

- The role of the ESAs, and particular the role of ESMA, when it comes to equivalence of market or post-market infrastructures, or in relation to equivalence of benchmarks administrators, should be increased in the legislative text in order to enable the ESAs to participate in the Commission's decision-making process in close cooperation with the EU institutions but without slowing down the process. If the engagement of the ESAs can be contemplated, it should be accompanied by a significant simplification of the process in order to avoid the additional role of the ESAs causing a slowdown in the negotiation and decision-making process by introducing additional interests into the already complex and challenging dialogue associated with achieving cross border equivalence.

- ISDA and FIA members support an outcome-based approach and we encourage the Commission to create a clear and pragmatic equivalence regime where the roles of the Commission and the ESAs are clearly specified.

I Tasks and powers of the ESAs

A. Optimising existing tasks and powers

1 Supervisory convergence

1. In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed? Please elaborate on your response and provide examples.

Due to the areas of focus of both ISDA and FIA, the Associations are mostly engaged with ESMA and with the EBA, and to a lesser extent with EIOPA. We appreciate the high technical expertise of the ESAs and their practical focus areas. We fully recognise the ESAs' efforts to ensure the workability of EU legislation and the openness for dialogue with the industry through consultations and meetings.

We also recognise the ESAs' efforts to clarify uncertainties arisen from Level 1 or Level 2 texts through Q&As and guidelines. The role played by the ESAs to ensure a convergent approach to implementation of rules by NCAs is crucial and we appreciate that the ESAs have prioritised supervisory convergence, as confirmed by the ESMA supervisory convergence work programme.

However, we continue to observe some inconsistencies and overlaps, for instance regarding the EU reporting framework. We note that in some instances the Level 1 text does not provide room for a harmonised approach at times when it is critical for the industry to rely on a consistent approach – for instance, without such consistent approach the application of the Level 1 requirements would be impossible –, it would be beneficial if the ESAs would have the capabilities to bring certainty where legislation fails to do so.

As a general principle, we support that the ESAs have the capacity to work on harmonised rules across EU pieces of legislation where overlaps and gaps are identified, without engaging into long and uncertain processes of changing Level 1 requirements.

With reference being made to the issues experienced during the implication of the various reporting regimes, the ESAs are being well equipped to identify what type of data is needed, and should assist work on a harmonised format across all legislative initiatives. A "once and for all" principle to data provision (i.e. identical identifiers for transaction or products, identical data fields when reporting regimes have similar purpose) should prevail.

2. With respect to each of the following tools and powers at the disposal of the ESAs:

- ***peer reviews (Article 30 of the ESA Regulations);***
- ***binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations)***
- ***supervisory colleges (Article 21 of the ESA Regulations);***

To what extent:

a) have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision;

The Associations do not have highly developed views on peer reviews, mediation and supervisory colleges.

However, we want to highlight that if convergence between NCAs in implementation of EU legislation is crucial, better coordination between the three ESAs is also important. We note that the joint ESA committee should aim towards more efficiently exchanging views of best practices between the ESAs. A number of EU pieces of legislation are cross-sectoral and deserve a strong coordination between the ESAs: Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation and Securitisation (STS) regulation are obvious examples but MiFID II/MiFIR also has cross-sectoral implications. Notably, the joint ESA committee should identify potential gaps, overlaps and inconsistencies between: a) different texts applying to the same industry participants; and b) same texts applying to different categories of industry participants.

b) to what extent has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?
Please elaborate on questions (a) and (b) and, importantly, explain how any weaknesses could be addressed.

Beyond the governance issues, we feel that the role of the ESA joint committee should be to help the BoS to converge in their decisions in order to ensure a harmonised approach to the implementation of EU rules.

We also think that the BoS should contemplate the appropriateness of creating ad-hoc joint ESA technical groups of specific issues. It would have been beneficial for the application of the PRIIPs regulation and would also have been helpful for the 'big data' and 'reporting' topics.

3. To what extent should other tools be available to the ESAs to assess independently supervisory practices with the aim to ensure consistent application of EU law as well as ensuring converging supervisory practices? Please elaborate on your response and provide examples.

Whilst it may not be appropriate for the ESAs to have a permanent seat in Council/European Parliament/trilogue discussions, a more systematic inter-institutional approach should be developed in order to appropriately involve the ESAs in the Level 1 discussions to allow them to both a) advise/provide opinions on the substance of the legislation as it is developed and identify areas where Level 1 measures might restrict supervisory convergence and b) input into the feasibility and appropriateness of Level 2 mandates. A possible solution could be to allow the ESAs to be present in the Level 1 discussions as observers.

This represents an upstream approach but may help ensuring convergence in supervision.

This would particularly be welcome for the equivalence assessments that have to be done under 15 different EU pieces of legislation.

4. How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases? Please elaborate on your response and provide examples.

The current role and engagement of the ESAs, notably ESMA, on cross-border issues is not sufficient.

Firstly, we are of the view that the ESAs should engage more at international level to ensure convergence. International standard setters such as the Financial Stability Board (FSB), International

Organisation of Securities Commissions (IOSCO), and Basel Committee on Banking Supervision (BCBS) benefit from the expertise of the ESAs and also appreciate their experience in setting harmonised rules between many different sovereign states.

We support the ESAs having an increased role in international standard setting bodies, where issues being discussed are within the mandate of the ESAs. We also recognise that given the geographic balance needed within international standard setters, increased involvement by the ESAs may result in reduced participation by NCAs. ESAs should coordinate to ensure sufficient participation by the ESAs where such participation would assist the ESAs achieve their objectives. We recommend the ESAs engage in dialogues with third country jurisdictions at an early stage when equivalence/ recognition is at the heart of a particular piece of EU legislation.

Secondly, regarding the equivalence assessments/ recognition processes, we think that the ESAs should have a greater role and should participate in the process in association with the EU institutions. Today, there are different 15 financial pieces of legislation, which include third-country provisions, and the ESAs could assist in making these processes more harmonised. This role should, however, not lead to additional delays in equivalence/ recognition process which is already a significantly burdensome process.

We note that since September 2013, of the 45 third-country CCPs that have applied for recognition under EMIR Art 25, the equivalence and recognition process has been completed for a total of only 28 CCPs.

Where ESAs are involved in the equivalence and recognition process, a significant simplification of the process needs to be considered. This will help to avoid slowing down the decision-making process as the ESAs may introduce additional interests into the already complex and challenging dialogue associated with achieving cross border equivalence.

2 Non-binding measures: guidelines and recommendations

5. To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed? Please elaborate and provide examples.

In this section, the Associations principally focus on ESMA and note that most legislative proposals tabled after the 2007/2008 financial crisis are now finalised. ESMA's focus is therefore shifting towards implementation and convergence of implementation at national levels.

In this respect Q&As, recommendations, broadly speaking all Level 3 clarification that ESMA produces are extremely important. Q&As are notably expected to address technical issues and to clarify uncertainties arisen from Level 1 and/ or Level 2 texts. We recommend ESMA to follow an inclusive approach when writing Q&As and consult the industry where possible. Given the highly technical character of these Q&As, such inclusive process is particularly important. MiFID II/MiFIR is the perfect example of a complex legislation that requires clarifications at Level 3 at an unprecedented level.

We also have experienced situations where ESMA may be reticent to propose guidelines and recommendations when the Level 1 text does not give any mandate to do so, even though the application of the Level 1 provision is unworkable without such guidelines and recommendations.

Also, the non-existent powers of the ESAs to produce "forbearance" or "no-action relief" to grant flexibility to national regulators in the enforcement of EU rules is a problem that has already been experienced with the implementation of the Level II rules, i.e., variation margin rules for non-cleared derivatives under EMIR and which may happen again with the implementation of MiFID II/MiFIR in January 2018 and future European financial regulation.

3. Consumer and investor protection

6. What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

7. What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA's involvement could be beneficial for consumer protection? If you identify specific areas, please list them and provide examples.

ISDA and FIA are not responding to questions 6 and 7 on investor protection as the Associations are not involved with legislation that directly involves the ESAs' consumer and investor protection powers. We already highlighted in response to question 2 that the joint ESA committee should serve better the required coordination between the ESAs.

4 Enforcement powers – breach of EU law investigations

8. Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure? Please elaborate and provide specific examples.

Generally speaking, any breach of EU rules by a supervised entity should involve an appropriate enforcement response by the NCAs. ESAs should have enforcement authority over those entities it directly supervises.

5 International aspects of the ESAs' work

9. Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts? Please elaborate and provide examples.

Equivalence decisions by the EC are a critical and essential process to maintain and provide access to global markets. It is therefore critical for the equivalence decisions to be taken in a timely manner in order to avoid putting any pressure on financial stability. The Commission should therefore review the equivalence process to ensure decisions are taken rapidly and ensure more resources are dedicated to the equivalence decisions. We would therefore call for simplification of the equivalence and recognition process. The potential increase of the ESAs role in the equivalence process should in no way

risk extending the time required to complete the assessments and decision-making process by introducing additional steps into the already complex and challenging dialogue associated with achieving cross border equivalence.

The equivalence framework should be strengthened by providing greater clarity and transparency on the equivalence assessment process itself, such as the respective roles of the Commission and the ESAs, the timeframes for the assessment and the mechanisms and grounds for withdrawal (including any notice periods for withdrawal). We therefore support the development of a pragmatic and transparent equivalence regime and believe greater transparency, predictability and consistency in the equivalence process is essential to make the process more efficient and effective. We believe that adopting an outcomes-based approach to assessing comparability across regimes is preferable to performing a granular line-by-line analysis.

We support further engagement of the ESAs at international level.

As an example, ESMA is not a part of the enhanced Multilateral Memorandum of Understanding (MMoU) of IOSCO that enables stronger cooperation between national securities regulators and allows them to investigate and to enforce national rules with foreign entities. It is difficult to see how non-EU national regulators may want to enter into such agreement at this stage with an ESA whereas they already have signed it with national competent authorities of many EU countries but the question would be relevant if new direct supervisory powers are granted to ESMA in the near future.

For a considerable period of time, ISDA and FIA members have engaged with international standards setters to support more convergence in the implementation of G20 commitments and recommended the EU authorities to be more active and instrumental at international level.

Consequently, we call for caution regarding any proposal to strengthen the powers of the ESAs in relation to monitoring and supervising third country entities and regulatory regimes. We have observed over the past few years the issues and potential market fragmentation that can be created where jurisdictions apply their standards in an extra-territorial manner. Further, there has been a tendency in some jurisdictions to respond by expanding its powers on an extra-territorial basis.

While each jurisdiction has taken a slightly different approach to deference and recognition, each major jurisdiction has shown a willingness to defer to the standards of others in different ways. In light of the on-going need for substituted compliance and deference on a variety of different topics ranging from CCP regulatory standards to the uncleared margin rules, we caution against taking any action that may precipitate a replay of past cross border regulatory conflicts. Such an outcome does not serve the interests of global economic growth/harmonisation, the stability of the financial markets or the members of ISDA and FIA who are active in the global derivatives markets.

6 Access to data

10. To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates? Please elaborate and provide examples.

The Associations note that a majority of respondents to the EU Call for Evidence, in early 2016, have flagged that the EU reporting framework suffers from a series of inconsistencies and overlaps. The reporting regimes are numerous (REMIT, EMIR, MIFID, SSR, MAR, SFTR), sometimes overlapping or providing inconsistent requirements.

While this issue is embedded in Level 1 legislation, we encourage the Commission to address this rapidly, the ESAs are well positioned to identify what data is needed, and should assist work on a harmonised format across all legislative initiatives. A "once and for all" principle to data provision should prevail.

11. Are there areas where the ESAs should be granted additional powers to require information from market participants? Please elaborate on what areas could usefully benefit from such new powers and explain what would be the advantages and disadvantages.

We support the ESAs in having access to required information that enable the ESAs to perform their tasks appropriately, particularly in the case of cross-border activities or in the context of supervisory convergence practices.

ESAs should then in principle be allowed to request information from market participants. However, in order to avoid any undue burden on market participants, we recommend the ESAs to first consider whether such information is available from the NCAs. The NCAs should commit to provide the information that is available to them without any undue delay, or confirm the unavailability of this information. In those cases where the required information is not available to NCAs, the ESAs should be provided with powers to request the information from market participants directly by providing reasonable timelines for the collection of the required data.

We also recommend that the ESAs consult market participants on developments in order to be able to identify potential issues at an early stage.

7 Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

12. To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements? Please elaborate your response and provide examples.

Reporting is at the heart of many different pieces of financial legislation implemented following the financial crisis: EMIR, SFTR, MAR, SSR, MiFID (and REMIT).

This global framework has increased market transparency and enabled regulators to assess market risks. However, it has also created duplicative, redundant and sometimes inconsistent reporting requirements.

We support ESMA's recent proposal to contribute to the design of a common EU financial data strategy and believe that the ESAs, and ESMA in particular, have an important role to play in this field. Such approach should be focused on reducing compliance costs for reporting firms while making the reports of greater use to the supervisory authorities. ESMA should play a leading role here.

We also support periodical reviews of the effectiveness and usefulness of the various reporting regimes. Consistency of data and reporting is one of the key challenges ahead of all policy makers and regulators, not only at European level but also at international level.

13. In which particular areas of reporting, benchmarking and disclosure, would there be useful scope for limiting implementing acts to main lines and to cover smaller details by guidelines and recommendations? Please elaborate and provide concrete examples.

The current regime is significantly inconsistent and complex and has caused implementation issues and challenges across the industry. We also note that many national regulators recognise the uncertainties, overlaps and wide scope of the various reporting regimes. ISDA and FIA members call for a holistic review of all templates developed for reporting and disclosure in order to ensure the effectiveness of the reporting regime across different pieces of legislation as well as across other jurisdictions.

8 Financial reporting

14. What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened? Please elaborate.

15. How can the current endorsement process be made more effective and efficient? To what extent should ESMA's role be strengthened? Please elaborate.

B. New powers for specific prudential tasks in relation to insurers and banks

1 Approval of internal models under Solvency II

16. What would be the advantages and disadvantages of granting EIOPA powers to approve and monitor internal models of cross-border groups? Please elaborate on your views, with evidence if possible.

2 Mitigating disagreements regarding own funds requirements for banks

17. To what extent could the EBA's powers be extended to address problems that come up in cases of disagreement? Should prior consultation of the EBA be mandatory for all new types of capital instruments? Should competent authorities be required to take the EBA's concerns into account? What would be the advantages and disadvantages? Please elaborate and provide examples.

3. General question on prudential tasks and powers in relation to insurers and banks

18. Are there any further areas where you would see merits in complementing the current tasks and powers of the ESAs in the areas of banking or insurance? Please elaborate and provide examples.

C. Direct supervisory powers in certain segments of capital markets

19. In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?

The Associations in the past have supported the direct supervision of Credit Rating Agencies and Trade Repositories. Thus, the Associations would support an assessment of how a direct supervision of pan-European entities, such as CCPs, would work in practice. This is an important question that would require further assessment. There are a number of factors that would need to be considered in deciding whether there should be a further transfer of supervisory responsibilities to the pan-European level, including:

- the value of supervision at the national level by authorities that are closest to the market where the CCP is located and where there is already strong coordination between regulators through supervisory colleges;
- the role of resolution authorities in the context of the EU draft regulation on CCP recovery and resolution;
- the need for coordination between supervisors (i.e. financial markets regulators) and prudential/ resolution authorities for systemic market infrastructures.

- This is an important question that would require further assessment and consultation if the Commission considers expanding the current supervisory powers of the ESAs.

- We call for caution regarding direct supervision of third country firms that are recognised in the EU or of location requirements. This approach would run contrary to the global trend which is towards a system of equivalence through recognition of comparable rules, which increasingly bolsters liquidity and efficiency in the global markets.

20. For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

21. For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories? Please elaborate on your responses to questions 19 to 21 providing specific examples.

II. Governance of the ESAs

22. To what extent do you consider that the current governance set-up in terms of composition of the Board of Supervisors and the Management Board, and the role of the Chairperson have allowed the ESAs to effectively fulfil their mandates? If you have identified shortcomings in specific areas please elaborate and specify how these could be mitigated.

23. To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively? Please elaborate.

    ISDA and FIA members highlight that beyond longer-term adjustment to the ESA's governance and powers, the upcoming review should focus on short-term improvements to establish the ESAs as credible supervisors with implementation powers. These should include:
    - Empowering the ESAs with the powers to temporarily suspend the application of regulatory requirements, similar to the "no-action" powers enjoyed by other supervisors outside the EU, such as the US. The recent uncertainty that arose from industry-wide difficulties to comply with the requirement to exchange variation margin for uncleared derivatives illustrated the need for a clear mechanism, which could bring clarity at the EU level.
    - Enable the ESAs to amend RTS, subject to appropriate scrutiny from the European Parliament and Member States. Currently, the ESAs do not have the ability to vary or amend technical standards rapidly when market circumstances change.

24. To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up? Please elaborate.

To strengthen the development of an EU common approach by the ESAs, ISDA and FIA members support the appointment of a few independent members to the BoS. The practicalities of the ECB model should be considered when developing such a model.

Naturally, when considering to grant the ESAs with voting rights, further attention should be paid to the ability for the ESAs to use the Qualified Majority Vote system for certain decisions.

We agree that the configuration of the ESA's governance may sometimes fail to deliver decisions in the best interest of the EU as a whole as the BoS is merely composed of representatives of NCAs. We therefore agree that the ESAs may benefit from some governance reforms by introducing independent permanent members on their BoS and MB.

Under the Regulation, the ESAs BoS may decide to admit observers. Currently, the heads of the NCAs of the European Economic Area (EEA) have an observer seat. We believe the observer seats are a good way to ensure greater collaboration and engagement with non-EU regulatory bodies and we would suggest for the Regulation to require the BoS to admit more observers at the table some of which should be dedicated to 3rd country regulators.

25. To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.

ISDA and FIA are of the view that the Chairs of the ESAs have a prominent role within the ESAs. We support to strengthen their role and mandates further and enable them to pursue a more harmonised approach. To achieve this, we support providing the Chairs with voting rights for BoS decision and to grant the power to decide in case of a split vote.

Given the importance of supervisory convergence, we also suggest giving the Chairs the power to request NCAs to provide the ESAs with timely information on supervisory convergence issues.

In recent years, through the implementation of the regulatory reform agenda, it has become apparent that there can be situations where the ESAs are being tasked with taking decisions which are rather political than technical and should have been decided in the Level 1 negotiations. There are also situations where the ESAs introduce Level 2 and Level 3 measures, which are not in line with what was intended by the co-legislators under Level 1. A greater involvement of the ESAs in the Level 1 negotiations could address this issue.

We therefore support giving the ESAs observer status for Level 1 negotiations at the trilogue stage for legislations where the ESAs will be expected to prepare Level 2 and Level 3 measures. As an observer, the ESAs could highlight issues, which should be decided upon during the political process or seek clarification on the exact intention of certain rules.

26. To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses? Please elaborate and provide concrete examples.

The Associations believe that the ESA review provides a unique opportunity to reflect on how to improve engagement with the industry and to benefit from a broader pool of expertise when the ESAs develop new rules. Today, the only official way of dialogue with the broader industry is through "Open Hearings" but these are limited in time and therefore do not allow for technical discussions to take place.

The ESAs should seek to make greater use of market stakeholder groups, which can be very efficient when they provide for an appropriate level of industry representation. ISDA and FIA members note that the stakeholders group until now have had little impact on the work of the ESAs.

The Associations' members observe that the role of the CWG could be further enhanced which would enable the ESAs to take a more practical approach on coordination of implementation of highly technical legislation (e.g. reporting rules under various pieces of EU legislation).

- We also support a commitment of the ESAs to hold CWG meetings on a more regular basis, e.g. quarterly. Today, the meetings are not held on a regular basis, which may impact the effectiveness of the CWG. Detailed agenda items should also be provided to the CWG members ahead of the meetings, and the ESA secretariats should be encouraged to provide information, where possible, to the CWG concerning the outcomes of the Board of Supervisors (BoS) actions as a result of the advise provided by the CWG, and specifically with information on how the BoS considered the CWG advice and the rationale of the actions taken.

- The CWG should also be designed in a way that enables the delivery of advice on technical issues. Although it is generally perceived positively, that ESAs have a diverse and vast membership, it appears that the CWG cannot really address technical issues on a number of topics. The constitution of ad hoc sub-groups composed of experts should be beneficial when legislation requires technical analysis, for instance on clearing or on reporting (this is particularly relevant for the ESMA CWG given the technical dimension of most financial Directives and Regulations). These ad hoc groups would not be permanent or meet on a regular basis but their expertise would be required when the technical questions around the implementing rules of a specific legislation requires the concerned expertise.

III. Adapting the supervisory architecture to challenges in the market place

27. To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective? Please elaborate and provide examples.
28. Would there be merit in maximising synergies (both from an efficiency and effectiveness perspective) between the EBA and EIOPA while possibly consolidating certain consumer protection powers within ESMA in addition to the ESMA's current responsibilities? Or should EBA and EIOPA remain as standalone authorities?

ISDA and FIA are not responding to these institutional questions - we already expressed our views of how the governance of ESMA could evolve and how the institution may be equipped with new powers.

IV. Funding of the ESAs

29. The current ESAs funding arrangement is based on public contributions:
    a) should they be changed to a system fully funded by the industry;

b) should they be changed to a system partly funded by industry?
Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

ISDA and FIA note that the current the funding arrangements differ between the three ESAs.

For the EBA, the resources combine contributions from NCAs and from the European Union Budget (60% of budget from NCAs, 40% from EU budget).

ESMA has a more diverse funding structure because they directly supervise CRAs and TRs. We are aware that at the end of 2015 the resources of ESMA were composed of (data taken from ESMA 2015 Annual Report):

i) the NCAs of the Member States - €14.6m, representing 40% of the total revenues;
ii) the European Union - €9.7m, representing 26%;
iii) fees charged to Credit Rating Agencies - €7.6m, representing 21%;
iv) fees charged to Trade Repositories - €2.1m, representing 6%; and
iv) NCAs' contribution for delegated tasks - €2.7m, representing 7%.

The Associations share the view that the ESAs have been given important regulatory and supervisory powers with somewhat limited resources, due to budgetary constraints. The Associations' members also appreciate that the independence of the ESAs, notably ESMA, is an important characteristic that must be preserved and appreciate that a majority of national financial markets regulators in the EU are independent.

The question of the appropriate level of funding for the ESAs and whether additional contributions are needed depends to a large extent on the level of new responsibilities given to the ESAs, including based on the outcome of the ESA review.

The Associations call for an open discussion with EU institutions and the ESAs to discuss the ESAs' budget and the potential forms of any industry contributions prior to the requirement for additional industry funding. Some key factors for any additional industry funding include:

- How to strike the right balance between entities that are subject to direct supervision (CRAs, TRs), pan-European entities not subject to direct supervision (large banks, large asset managers, listed corporates, securities dealers, commodity dealers, administrators of critical and significant benchmarks), and entities that are active mostly at national level (retail banks, small asset management companies).
- The impact Brexit will have on the ESA's supervisory workload, and the population of firms that would be required to provide funding.
- Any additional industry funding for the ESAs must be provided to the ESAs on the basis that the ESAs are transparent about how the funding is used, and that the ESAs ensure the additional funding is used to improved their operations in measurable ways, for example with better managed consultations and more timely Q&As.
- The form that any additional industry contribution may take requires detailed discussion: should it take the form of a direct levy collected by the ESAs (how could a levy be collected from firms that are not directly supervised?), or should a levy be collected at national level by NCAs and subsequently transferred to the ESAs? Is this considered a double-assessment if the industry is paying one time to the NCA and one time to the ESA for the same oversight?
- The question is much more complicated for ESMA than it is for the EBA and EIOPA because of the very heterogeneous nature of the ecosystem of financial markets and its stakeholders.

If the EC decides to opt for a model partially funded by the industry we would encourage the EC to further consult on the details of such model to find a suitable and mutually beneficial outcome.

We are also of the view that where activities (e.g. supervisory activities) are being moved from NCAs to the ESAs, their related budgets should move to the ESAs as well and should not lead to an overall increase of charges to the industry. In cases where ESAs obtain new direct supervisory powers, these should be fully funded from those who are being supervised. With regard to CRAs and TRs it should be noted that a significant proportion of them are currently based in the UK, contributing to the ESAs' budget. If they remain in the UK following the UK leaving the EU, this could pose a risk to ESMA's funding and these consequences need to be carefully assessed.

30. In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities:
    a) a contribution which reflects the size of each Member State's financial industry (*i.e.*, a "Member State key"); or
    b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")?
    Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (e.g., total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.

31. Currently, many NCAs already collect fees from financial institutions and market participants; to what extent could a European system lever on that structure? What would be the advantages and disadvantages of doing so? Please elaborate.

    In response to questions 30 and 31, ISDA and FIA members feel that it may be too early to enter into detailed discussion and that more time is needed: a thorough coordination with the industry would be highly desirable.

General question

32. You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above. Please include examples and evidence where possible.

    <u>"Regulatory forbearance" regime</u>

    Introducing a "regulatory forbearance" regime would improve the regulatory process of the ESAs, and consequently make them more effective and would make the implementation of EU financial legislation more manageable. Such a regime would mirror the US no-action letter regime. It would enable the ESAs to issue a letter stating that the ESAs or national competent authorities (NCAs) will not commence enforcement action for failure to comply with a specific provision of a EU regulation or directive, or of one of its implementing rules. Such a measure would provide necessary flexibility to the industry through the relevant regulatory authorities (ESAs and NCAs) at times when needed most, particularly when introducing complex rules or general rules that are ill-suited for a particular entity. Such a tool would improve the operations of all ESAs. We would note that any such power granted to the ESAs

should not preclude NCAs from applying their own discretion to grant their own forms of regulatory relief.

Implementation timelines.

Application dates of prominent EU pieces of legislation (EMIR, MiFID II/MiFIR, PRIIPs) have also proved unworkable for many reasons and have forced EU legislators to intervene and postpone the application dates.

The main reason is that the Level 1 texts set full application dates without considering the time needed by the ESAs to deliver implementing rules and to build all underlying systems that are required for the implementation of the provisions. Rather than setting absolute application dates, the EU legislators should consider setting application dates by reference to a period (12, 18, 24 months, depending on the legislation and on the challenges associated) starting from the publication of the final approved level 2 rules.

ESA's capacity to produce economic/ impact analysis

Over the past years and in light of regulatory reforms underway, a number of regulators both inside and outside of the EU (for example the SEC/CFTC) have strengthened their resources in the area of economic/impact analysis.

We recommend the ESAs to strengthen their capacity in this area and develop their own impact assessment frameworks to evaluate the implementation costs of secondary legislation. This can be implemented without changing the legal framework.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers.

Information about ISDA and its activities is available on the Association's website: www.isda.org.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry.

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